

**DW 04-020**

**FRYEBURG WATER COMPANY**

**Investigation into Water Quality**

**Order on Procedural Schedule**

**ORDER NO. 24,594**

**March 3, 2006**

Appearances: Upton & Hatfield, LLP by Russell F. Hilliard, Esq. on behalf of Fryeburg Water Company; F. Anne Ross, Esq. and Rorie Hollenberg, Esq. on behalf of the New Hampshire Office of Consumer Advocate; William Black, Esq. on behalf of the Maine Public Advocate; and Suzanne Amidon, Esq. on behalf of Commission Staff.

**I. PROCEDURAL BACKGROUND**

On February 24, 2004, the New Hampshire Public Utilities Commission (Commission) opened Docket No. DW 04-020, Fryeburg Water Company (Fryeburg), Investigation into Water Quality.<sup>1</sup> On June 2, 2005, the Commission issued Order No. 24,471 which created Phase II of Docket No. 04-020 to address engineering solutions to the water quality problem. Subsequently, on December 9, 2005, the Commission by Order No. 24,559 scheduled a prehearing conference for January 23, 2006 to hear from the Staff and the Parties on the following issues:

1. The adequacy of Fryeburg's August 1, 2005 testimony. (Order No. 24,471 issued June 2, 2005 directed Fryeburg to file "definitive and detailed testimony for the implementation of an engineering improvement plan to address the water quality issues experienced by East Conway customers as a result of the 1883 main");
2. The status of the development of a municipal water district in Fryeburg, Maine; and
3. The status of Fryeburg's efforts to transfer its New Hampshire assets to Pennichuck Corporation (Pennichuck) or any other entity. (In his August

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<sup>1</sup> For a more detailed procedural background, refer to Order No. 24,559 (December 9, 2005) slip op at 1-2.

1, 2005 testimony, Hugh Hastings, President of Fryeburg, stated that Fryeburg had entered into a letter of intent to sell the operation west of the Saco River to Pennichuck).

In addition to scheduling the prehearing conference to take statements from the Parties and Staff on the above issues, Order No. 24,559 directed Fryeburg to file a copy of the letter of intent between Fryeburg and Pennichuck and other related documents with the Commission by January 6, 2006.

On December 9, 2005, Fryeburg filed with the Commission a letter requesting permission to conduct inspections of certain customers' plumbing fixtures, and to cease service to those customers who refused inspection, citing rules of the Maine Public Utilities Commission. Fryeburg stated that it had come to the attention of the Company that some of the problems with water quality may be related to individual service lines or hot water tanks because Fryeburg had been consistently conducting flushing of the old cast iron main. Further, Fryeburg stated that since the bottled water had become available on August 8, 2005, 45 customers in East Conway and West Fryeburg<sup>2</sup> had not availed themselves of the bottled water. Fryeburg stated that the inspection of the customers' plumbing would help the Company understand the cause of the water quality problems.

On December 14, 2005, Staff filed a letter with the Commission noting that Fryeburg's tariff filed with the Commission permits inspection of plumbing fixtures in residential premises.

On December 19, 2005, the Office of Consumer Advocate (OCA) filed with the Commission a response to Fryeburg's December 9, 2005 filing and requested that the Commission order Fryeburg to produce certain information including:

- A description of the criteria Fryeburg had used to select the customers to be subject to inspection;
- Information related to each and every past and future flushing of the main including copies of any and all documents related to the flushing;
- The types and characteristics of the “monitoring filters” used on the 1883 main;
- The qualifications of the individuals conducting the inspections;
- A list of all customers who have taken advantage of the free bottled water provided by Fryeburg pursuant to Commission order; and
- Written reports on all inspections.

On December 29, 2005, Fryeburg filed with the Commission a response to the OCA filing stating that it had no objection to the request for information. On January 9, 2006, Fryeburg filed with the Commission a status report which stated that “Fryeburg Water Company submits the following Status Report regarding the proposed transaction with Pennichuck Water Company. Pursuant to the letter of intent, the parties have exchanged draft Asset Purchase Agreements, and expect the transaction to be consummated upon completion of Pennichuck’s investigation and resolution of outstanding issues as reflected in the drafts being exchanged between counsel.” Fryeburg did not file a copy of the letter of intent or any other documents related to the transaction with the Commission.

On January 11, 2006, Staff filed a letter with the Commission noting that the municipal vote regarding the creation of a Fryeburg Water District had been rescheduled from January 17, 2006 to February 14, 2006.

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<sup>2</sup> About seven West Fryeburg, Maine customers of Fryeburg receive water service from the 1883 cast iron main.

At the January 23, 2006 hearing, the Commission took statements on each of the issues identified in Order No. 24,559. In addition, the Commission inquired into whether the December 9, 2005 letter from Fryeburg constituted a new theory for the poor water quality received by Fryeburg customers who reside west of the Saco River, and the status of the OCA request for information. Finally, the Commission directed Staff and Parties to report back on the status of negotiations between Pennichuck and Fryeburg and propose a procedural schedule to address the Phase II engineering issues. Staff filed a proposed procedural schedule on January 24, 2006.

On February 24, 2006, Fryeburg filed with the Commission a “status report” consistent with the procedural schedule proposed by the Staff. The filing reported on the status of the Pennichuck negotiations, locating a new water source, the vote regarding the creation of a Fryeburg Water District in Maine and information described as responses to the OCA request for information.

## **II. POSITIONS OF THE PARTIES**

### **A. Fryeburg Water Company**

At the outset of the hearing, the Commission questioned Fryeburg about whether the request to inspect residential lines and tanks constituted a new theory of causation for the poor water quality received by its customers in East Conway. Fryeburg responded that with respect to its customers in East Conway “some folks don’t have a problem with their water.” Hearing Transcript of January 23, 2006 (Tr. 1/23/06) at 9 lines 3-4. When questioned by the Commission whether this statement was based on anecdote or constituted an engineering judgment, Fryeburg admitted that it was anecdotal and based on the comments of a few

customers. Fryeburg also stated that the company's interest in conducting inspections was not a change in position, but was based on the theory that customers experiencing poor water quality may not have properly maintained their residential lines and tanks. Tr. 01/23/06 at 43 lines 7-13. Fryeburg stated that as of the date of the prehearing conference the inspections had not been performed and suggested they would not be performed in the future.<sup>3</sup> On the subject of the adequacy of the August 1, 2005 testimony submitted by Fryeburg evaluating the engineering options to improve water service to its East Conway customers, Fryeburg contended that the testimony was "sufficient to give everyone else involved in the proceeding a chance to take a position on what they think ought to be done and what technique used." Tr. 1/23/06 at 12 lines 1-4.

With respect to the progress in creating a water district in Fryeburg, Maine, the Company could offer no information other than that the vote was postponed to February 14, 2006, because of a problem with the notice. Tr. 1/23/06 at 16 lines 16-18.

Regarding the potential purchase of its New Hampshire assets by Pennichuck, Fryeburg provided a letter of intent dated July 28, 2005, and requested that the purchase price referred to in the letter of intent and in the January 4, 2006 draft asset purchase agreement (Ex. 31, Tr. 1/23/06) be treated as confidential information. Fryeburg asked that Pennichuck's proposed contribution to improvements as stated in Ex. 31 also be treated as confidential information.

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<sup>3</sup> Mr. Hastings stated that the inspections had not occurred because "[t]hey create such a ruckus, and we [the company] did it all in good faith, and they bring back a ten-page letter telling us how we're going to do things and report. Heck with it." Tr. 01/23/06 at 41 lines 17-19.

Fryeburg reported that following the initial exchange of the letter of intent, it had received sometime in the fall a proposed contract drafted by Pennichuck's counsel.

Subsequently, Pennichuck and Fryeburg negotiated an agreement. Fryeburg stated that Exhibit 31 constituted its first written response to Pennichuck's proposal and it was waiting to hear Pennichuck's response to the January 4, 2006 draft.

Fryeburg contended that the negotiations with Pennichuck, if successful, would mean that Pennichuck would decide how to supply water to East Conway customers. Tr. 01/23/06 at 15 lines 23-24. When asked how the creation of a water district would impact the asset purchase transaction, Fryeburg said that it was looking into finding an alternative supply of water on the west side of the Saco River and that Pennichuck will make a contribution to this improvement if the transaction is consummated. If these events occur, the West Fryeburg and East Conway customers will be customers of Pennichuck, not the water district. Fryeburg stated that it already has a drilling contract and will be going forward with test drilling to discover whether Fryeburg could locate a new source of water supply provided that Pennichuck agrees to the asset purchase. Upon questioning, Fryeburg testified that drilling a well is probably a better option than putting in a new transmission main under the river, and that the existing main could be used as a backup in case of emergency. Tr. 01/23/06 at 34 and 35 lines 23-8. Fryeburg did not believe creation of a district would affect moving forward with a supply west of the Saco River or a sale of assets to Pennichuck. Finally, with respect to OCA's December 9, 2005 request for information, Fryeburg testified that it would provide the information "if the Commission wants us to." Tr. 01/23/06 at 40 line 6.

## **B. Maine Public Advocate**

The Maine Public Advocate (MPA) did not take any position with respect to the adequacy of the August 1, 2005 testimony. The MPA offered information regarding the vote scheduled in Fryeburg, Maine for February 14, 2006. The MPA stated the warrant asked the voters if they want to create a Fryeburg Water District and authorize the District to purchase the assets of Fryeburg. The MPA cautioned that even if the warrant is approved, the creation of a water district will not happen quickly.

When asked how the creation of a Fryeburg Water District would affect the purchase of the New Hampshire assets by Pennichuck, the MPA opined that it would not cause a problem, although the MPA pointed out that approximately seven of Fryeburg's customers in West Fryeburg, Maine who also receive water through the 1883 main would also be included in such a district. The MPA generally supported a sale to Pennichuck but acknowledged that, after the sale, it may be appropriate to amend the law to exclude West Fryeburg, Maine from the water district.

### **C. Office of Consumer Advocate**

The OCA stated that it does not believe that the August 5, 2005 testimony of Fryeburg was sufficient because, in its view, the Company did not choose an appropriate option. The OCA contended that Fryeburg runs the company and, therefore, it has to make a decision, explain its choice, and move forward with implementing the solution.

The OCA expressed concern that the creation of a water district would prohibit the sale of Fryeburg's New Hampshire assets to Pennichuck. The OCA inquired as to whether Fryeburg understood that the terms proposed in the draft asset purchase agreement, dated January 4, 2006, would be generally acceptable to Pennichuck and Fryeburg responded in the

affirmative. Finally, the OCA reiterated its request for information identified in its December 19, 2005 filing with the Commission.

#### **D. Commission Staff**

Staff stated that the August 1, 2005 testimony filed by Fryeburg is insufficient because the Commission specifically ordered Fryeburg to evaluate the alternatives and submit detailed and definitive testimony as to how to implement a solution to the water quality problems experienced by Fryeburg's customers in East Conway. Staff opined that the filing skirted the issue of evaluation of an engineering solution by suggesting that a potential purchase was imminent. Staff expressed concern that months had passed and still Fryeburg did not have an opinion on the preferred solution. Staff requested that Fryeburg be required to submit definitive testimony on an engineering solution within 10 days of the prehearing conference.

Regarding the potential creation of a municipal water district, Staff noted that there is no guarantee that a Fryeburg Water District in Maine will address the water quality problems for Fryeburg's New Hampshire customers.

Staff noted that months had passed between Fryeburg's receipt of a draft asset purchase agreement and Fryeburg's response, and that Staff believes Fryeburg is not inclined to respond to any of the Commission's orders unless specific requirements and deadlines are imposed. Staff reiterated its support for a transfer of ownership to Pennichuck, but in the meantime Staff noted that the Commission and the Parties would be served by periodic updates to understand how negotiations are proceeding, and how matters are proceeding in Maine. Staff did not offer a position at the hearing regarding the OCA's December 19, 2005 request although Staff did concur with that request as stated in the filing.



### III. COMMISSION ANALYSIS

At the outset, we address the procedural matter presented by Fryeburg's request for confidential treatment of the sale price set forth in the asset purchase agreement and letter of intent, and the amount of Pennichuck's proposed contribution to test well drilling in the asset purchase agreement. Because these elements are the subject of negotiation for the potential acquisition of Fryeburg assets by Pennichuck, we find these elements to be commercially and financially sensitive and that the information is exempt from disclosure pursuant to RSA 91-A:5, IV and New Hampshire Admin. Rules Puc 204.06. Therefore, we will grant Fryeburg's request for confidential treatment of these elements.

As described below, Fryeburg has exhibited a pattern of willful behavior in this proceeding of responding incompletely to Commission directives and taking steps that have effectively stalled the prompt and orderly conduct of this proceeding.

By Order No. 24,471 (June 2, 2005) Fryeburg was directed to submit "detailed and definitive testimony as to how to implement a solution." In response, Fryeburg submitted a three-page document restating the two options identified by its consulting engineer—replacing the main or drilling new wells—and concluded by indicating that the company was in negotiations with Pennichuck for a possible sale of assets.

By Order No. 24,559 (December 9, 2005) Fryeburg was directed to submit a copy of the letter of intent and other related documents concerning the proposed purchase by Pennichuck. Instead of filing the documents, which apparently were available, Fryeburg submitted a two-sentence filing stating that a letter of intent was signed and that negotiations were in progress.

On December 19, 2005, the OCA requested certain information from Fryeburg but while the Company responded that it did not object to the request it did not provide the information. Instead, Fryeburg indicated that it would provide the information if required to.

At hearing on January 23, 2006, while denying it was doing so, the Company posed an entirely new theory of the case. Despite not having challenged the ruling that poor water quality in East Conway is the result of the condition of the 1883 cast iron main under the Saco River, Fryeburg now suggests that improperly maintained hot water heaters may be at fault. This theory was espoused by the brother of the President of the Company based on a recent experience he had while visiting a relative in Williamstown, Massachusetts.

It is fairly inferred from Fryeburg's conduct that it seeks to avoid responsibility for implementing an engineering solution to the water quality problems in East Conway but hopes that the problems will be taken on by another entity, such as Pennichuck. While it is conceivable that such a result could occur, Fryeburg, to the detriment of its customers, has too long avoided its obligations and too slowly pursued both an engineering solution and a sale alternative. In other circumstances, it would be advisable to consider the revocation of Fryeburg's franchise and withdrawal of its authority to engage in business. Such steps here, however, are unlikely to contribute to the welfare of customers. The options available to us under these circumstances are to consider the imposition of an additional penalty against the officers and agents of Fryeburg pursuant to RSA 365:42 and to contact the Attorney General pursuant to RSA 374:41 to institute action against Fryeburg.

However, we note that, consistent with the procedural schedule proposed by Staff, Fryeburg submitted a "status report" on February 24, 2006, which represents progress in some

respects in terms of responsiveness. Specifically, the status report adequately addresses the status of the municipal vote in Fryeburg, Maine, provides useful information about the effort to locate a new water source on the west side of the Saco River, and appears to address the OCA's request for information. On the other hand, Fryeburg's status report is lacking in providing us an adequate basis for reaching any conclusion about the prospect or timing of an agreement with Pennichuck.

Therefore, inasmuch as Fryeburg has exhibited some progress in the quality of its reporting and compliance, we will hold in abeyance steps that would impose an additional penalty, or result in action by the Attorney General, so long as the following requirements are satisfied by March 24, 2006. With respect to the negotiations with Pennichuck, we direct Fryeburg to file a copy of the letter of intent signed by both parties, along with copies of all relevant documents and detailed information regarding the proposed transaction with Pennichuck, as well as a narrative explaining its and Pennichuck's next steps and expectations regarding the prospects and timing of an agreement. We also direct Fryeburg to provide additional information regarding the proposed site for the well, including a map with its location and a description of a proposed distribution line. We further direct Fryeburg to explain what "approvals" (as referred to in the status report) are required before testing is commenced and what actions it is taking to obtain such approvals. In addition, we require Fryeburg to inform us if the Company has entered into a contract for test drilling, and to provide us with a copy of any contract and a schedule for the test drilling. Last, to the extent that the OCA finds the responses to its requests for information to be deficient, the OCA may conduct additional discovery.

Fryeburg should consider this order to require the Company to respond completely to any further inquiries of the OCA.

Finally, we find that Fryeburg has failed to provide sufficiently “definitive and detailed testimony for the implementation of an engineering improvement plan to address the water quality issues experienced by East Conway customers.” We therefore direct Fryeburg to file supplemental testimony identifying a specific engineering solution to the water quality problems experienced by Fryeburg’s customers in East Conway and setting forth the means and timing for implementing that solution. Fryeburg shall file such testimony by April 7, 2006.

**Based upon the foregoing, it is hereby**

**ORDERED**, that Fryeburg file, by April 7, 2006, supplemental testimony as described herein regarding an engineering solution for the water quality issues experienced by its East Conway customers; and it is

**FURTHER ORDERED**, that Fryeburg file with the Commission, by March 24, 2006, the additional information described herein concerning the status of negotiations with Pennichuck, and the development of a new water source; and it is

**FURTHER ORDERED**, that the filings identified above shall be delivered to the Commission and served to all parties and individuals on the service list in Docket No. DW 04-020; and it is

**FURTHER ORDERED**, that Fryeburg's request for confidential treatment of certain information is GRANTED, as described herein, and it is

**FURTHER ORDERED**, that the Commission shall hold a status conference in this matter at which attendance of Fryeburg is required on May 3, 2006 at 10:00 a.m.

By order of the Public Utilities Commission of New Hampshire this third day of  
March, 2006.

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Thomas B. Getz  
Chairman

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Clifton C. Below  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary